United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-6037

United States Court of Appeals

FOR THE SECOND CIRCUIT

HANNA B. WAKIM,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES CITED

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Issues

Defendant does not believe the issues stated by plaintiff present issues on this appeal because of an absence of a showing by plaintiff that the Lower Court finding that plaintiff was mugged ashore with resulting functional injuries are clearly erroneous or that the Court failed to consider defendant's negligent medical treatment of plaintiff. However, if defendant is laboring under a misconception, defendant restates the issues as follows:

1. Where the orthopedic experts for the adverse parties examined the complete records of plaintiff's treatment at the Staten Island Marine Hospital and were subject to cross-examination and examination by the trial judge, and the parties had briefed the medical evidence did the trial judge, impressed with the opinion of the medical expert for the vessel at the close of the medical evidence, commit reversible error in failing to independently examine the records prior to rendering an opinion accepting the vessel's expert opinion.

2. Where there is sufficient evidence to substantiate the findings of fact that plaintiff's complaints were functional and not physical and that they may have resulted from a shoreside mugging and not from any accident on the vessel, can these findings be considered clearly erroneous absence a showing to the contrary by the plaintiff.

3. Where at the close of the case the trial court, *sua sponte,* considered defendant's liability for negligent treatment, an unnecessary spinal operation, and rejected it by finding in its memorandum decision that the operation resulted from misinformation imparted by the plaintiff to the medical and hospital staff either deliberately or because of functional complaints, should the plaintiff be allowed to open the judgment and litigate that issue again.

Statement of the Case

Appellant, plaintiff below, appeals the amended judgment of the United States District Court, Southern District of New York, dated April 4, 1975, dismissing all of appellant's claims, other than the claim for maintenance which was specifically reserved,[1] arising out of personal injuries allegedly sustained during his employment as a seaman aboard the S/S Sioux Falls Victory.[2]

The Facts

Appellant,[3] a Lebanonese, joined the vessel on October 4, 1969 as an ordinary seaman (G)[4] for a voyage from Sunny Point, North Carolina to Vietnam and return.

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[1] The claim for maintenance was settled after entry of judgment.

[2] Referred to variously as the ship or vessel or owners.

[3] Plaintiff refers to Appellant.

[4] Numerals refer to pages of trial testimony in the joint appendix. The deposition of Robert Truitt, Chief Electrician, is a part of the record. Reference to his testimony will be indicated by RT to designate the page of his deposition.

The Shoreside Robbery and Mugging

On October 15, 1969, the plaintiff went ashore at Colon, Panama, the first port after sailing from Sunny Point. Plaintiff, aware of the contents, signed a statement in English that while ashore he was mugged and robbed (9) by three men, one from the back and one from each side. The one from the back tried to strangle him. He was dragged into a dark alley. He fell to the ground and passed out from the beating (90). He complained of pain in the neck area and arms and on one occasion he spit blood (91) (A17-18). Plaintiff's clothes looked like he slept in them all night (24). Plaintiff was shook up (24), with bloodshot eyes (25). He looked like he had spent a rough night (25).

Medical Treatment Abroad

On arrival at Cam Ranh Bay, Vietnam, plaintiff was seen by an Army doctor and given non-avitamins and Robaxin 500 mg. (91, A12).

At the next port of call, Okinawa, plaintiff was sent ashore with a master's certificate (A31). He was seen on December 4, 1969 by Dr. J. P. Javier at The Family Clinic (A13). He was examined more or less completely, including X-rays of the chest and cervical spine, complete blood counts and urine analysis. No abnormal findings were noted. However, appellant complained that he had been losing weight from 150 to 130 pounds for no apparent reason and his arms have been losing power and getting smaller. He had a history of being badly mauled and almost strangled (92-93). The treatment provided was B-12 and B-comp i. m. The doctor recommended repatriation for further examination, including neurologic. Plaintiff was certified fit to travel by air (93). Plaintiff gave no reason to the chief officer (30) or purser for his request for medical care at Okinawa (A14).

Plaintiff left the vessel on December 4, 1969 and was repatriated to New York City by air in the company of Third Cook Bryant Williams, plaintiff's sole fact trial witness, who claimed a back injury aboard the vessel and subsequently instituted suit against the vessel (34-35, 41).

The Alleged Shipboard Accident: Defendant's Lack of Knowledge of Oil on Deck. Plaintiff's Testimony

Shortly after midnight, upon sailing from Vietnam to Okinawa, Mr. Clark Sheehan, plaintiff's watch officer (80), the third mate in charge of navigation on the bridge, telephoned the bow, plaintiff's station as lookout. Plaintiff stated that the mate said in English "Wakim come here" (13). The weather was bad (79). The wind was picking up briskly (81). It was stormy (A32). The vessel was taking spray on her forward decks (28, 36). She was riding high in the water (36).

Plaintiff left the bow and proceeded aft on the port side of the vessel about 5′ outboard from the hatches. He played a flashlight not on deck but in front of him (69). He claims that when he was about 5 feet opposite the winches between hatches No. 2 and 3, he slipped and fell striking his back, head and leg on the deck. He got up and noticed that he had slipped in a pool of oil about 1′ in circumference. He did not see the oil before he fell (66). He did not know how long it had been on deck (66). He did not know the source of the oil (69). The second day after the accident plaintiff noticed that his pants were soiled with oil (71-72).

There are two winches, port and starboard, for No. 2 and No. 3 hatches. The winches for each hatch are separated from one another by a mast house. The No. 3 hatch is just forward of the midship house (A64). It was about 20′ from the winch bed to the port side of the ship (A62).

Plaintiff's Failure to Report the Accident

Plaintiff immediately went to the bridge on arrival at the midship house from the bow. He admits he made no report of the accident to Mr. Sheehan (79). While plaintiff was aboard Mr. Sheehan never learned that plaintiff had fallen on the ship (80-81) and thus never reported the alleged accident (82). The vessel's log contained no entry of an accident (82). The vessel's procedure, is to report the accident to the watch officer, the third officer or purser (A30). Plaintiff did not report the accident to Mr. Vulliet, the Chief Mate (A30-31, 33) or Mr. Tidwell, the purser (A12-13) or to Dr. Javier at Okinawa (93). No accident report was filed (A13) by the chief officer. No report of an accident was made to the chief officer by the purser or bosun or by the bosun (A30) to the purser (A13). The bosun died in 1970. Plaintiff did not take his deposition. If an accident is reported and the injured cannot stand watch, the Chief Mate will provide a replacement (82). Plaintiff continued with his watch until he left the vessel (A32, A34; 70, 80).

Plaintiff's Sole Fact Witness, Mr. Williams

Plaintiff and his attorney admits that there were no eyewitnesses to plaintiff's accident (17, 18, 32). Williams, with whom plaintiff first discussed his accident at the Marine Hospital four years after its occurrence (30) and testified six years after the accident, saw plaintiff enter the bridge house from the forward main deck (20, 21). As plaintiff passed by Williams, Williams saw plaintiff examining himself (33). He saw a little grease on plaintiff's legs and his hand (21). Williams went onto the main deck to play his tape recorder (20, 21) so as not to disturb the crew (22). There were sprays coming over the deck (28, 36). The ship was riding high in the water (36). As Williams walked forward, he saw some grease on deck between the third and second hatch, described as some little grease, a lot of grease (22), 3½ feet wide (37)

and 4½ feet from the hatch (42), about 2½ feet in front of a step off which he stepped. The step was between the hatch and a truck on deck (38). He saw the grease on deck without the aid of a flashlight (40). The moon was out (39). He had been on deck before but did not see the grease (23). At no time did he ever discuss the grease with plaintiff (32). He did not know the source of the grease (41). He did not report the grease to anyone (30). Williams told plaintiff that he ought to see the purser (30). At the close of the case the trial judge stated that he was not very impressed with Mr. Williams (A115).

The Absence of Oil and Source of Oil on the Deck

The Chief Officer's job took him to the forward deck, port side, abreast No. 2 and 3 hatches (A31). He saw no oil or grease on deck (A31-32).

Mr. Wilton Johnson, first assistant engineer and the day maintenance man, was responsible for mechanical repairs to the vessel's machinery, including the winches (6). He was the officer who received complaints about breakdown of machinery (6). No mechanical breakdown of the winches for hatches No. 2 and No. 3 were ever brought to his (7) or the Chief Engineer's attention (60). Nor was any oil spills at that place drawn to his attention (7). The winches were in very excellent condition (7). On occasion there were electrical failures, mostly minor, repaired by the electrician (12) under the direction of the Chief Engineer (A59). One or two selnoid coils and pilot switches were changed (A59, RT16). Such type of repairs are not entered in the engineer's log (A62-63). This type of work does not entail working with oil or grease (RT16, 26). It is the job of the person who spills oil on deck to clean it up (12).

During the time that the Chief Engineer (9) and the Chief Electrician worked on the winches, they had no occasion to clean up any oil or grease in that area (9) or to

report to the vessel's officers about such a condition in that area (9-10). The Chief Engineer saw no oil spillage in that area when he worked on the electrical parts of the winch the day the vessel sailed from Cam Ranh for Okinawa (A68). Nor did the Chief Electrician (RT17) whose duty it was to report any hazard on deck to the Chief Officer. During the 4-5 days before sailing from Cam Ranh he observed no hazard in the nature of oil or grease on deck which would entail reporting it to the Chief Mate (RT30).

The Chief Electrician kept track of greasing the winches and the oil level in the gear boxes, adjoining the electrical winch boxes (A67), as a routine bases on the voyage (A68).

The winches were electrical (RT12). Between Sunny Point and the Canal Zone, the winches were greased with an alemite gun (RT14). Five gallons of oil, a heavy gear grease SAE90, was distributed in the gear box of 16 winches (RT12, 28). The depth of the oil was measured with a stick through a standpipe (RT12). No oil or grease was spilled on deck during the greasing of the winches and the addition of gear oil to the gear casing (RT14). Ten of the fourteen days the vessel was at Cam Ranh the decks were washed down by torrential rains (RT15).

Plaintiff's Ability to Speak and Understand English

The trial court found that plaintiff understood the English language and could either express himself in English or could convey his meaning to people who only spoke English (144). Plaintiff and Mr. Sheehan were able to understand each other. He spoke to plaintiff by omitting verbs (81). Although plaintiff did not speak English too good (A7), plaintiff gave Mr. Tidwell, purser, a signed statement of which he was aware (A18) in English about the mugging ashore, the nature and extent of his injuries and his desire to stay aboard (90, A9, A15). Plaintiff was

able to convey to Mr. Tidwell that he was seasick (A9); that he wanted to see the doctors who came aboard at Guam, an unexpected stop to put two seamen ashore for medical care (A10-A11, A28), and asked for medical care at Vietnam (A12) and Okinawa (A13). Plaintiff asked the third cook in English to speak to him in French (27) which the cook could not do (27). At the Marine hospital plaintiff and Williams conversed in English for 5 minutes (33) about Williams appearing as a witness for plaintiff (52).

According to Chief Mate Vulliet, plaintiff spoke enough English for shipboard business, taking and receiving orders (A27).

After Williams played his tapes, he went to the messhall. While he, the bosun and a couple of other fellows were there, plaintiff came into the messhall. Plaintiff told Williams in English that he had hurt himself (29) Williams told him to see the purser (29, 30) but had no knowledge that plaintiff actually saw the purser (30) plaintiff stated in English to the bosum and purser he fell (76). The court did not accept plaintiff's alleged reports. Mr. Vulliet (A27-28) Mr. Truitt and the Chief Electrician, conversed in English with plaintiff about the mugging ashore. The latter also conversed with plaintiff about plaintiff's subsequent sea sickness. He also stated that plaintiff understood English (RT8-10). After plaintiff returned from the doctor at Okinawa plaintiff understood the purser's statement in English: "You are going home" (58).

On arrival at the Staten Island Marine Hospital on December 6, 1969, plaintiff, without the benefit of a translator, told the doctor about the mugging on October 14, 1969 and slipping five days later, while going to lookout, injuring his left ankle and upper back (106). The hospital records are replete with instances where plaintiff conversed with the doctors without the benefit of a translator.

At the trial the plaintiff presented an interpreter. The Court directed that the interpreter assist and interpret only when required to do so (3). Plaintiff testified in English. During the course of 37 pages of direct and cross-examination (4-16, 52-77) the services of the interpreter was used only on 14 occasions (7, 12, 15, 52, 53, 54, 57, 60, 63, 64, 73, 77) and dealt with single questions or answers for classification.

Medical Care at New York. The Expert Testimony

Plaintiff was an inpatient and an outpatient on occasion at the Staten Island Marine Hospital from December 6, 1969 to February 1974. The history given by plaintiff on admission, without an interpreter, was that he was attacked on October 14 by several men and sustained neck and arm pains. Five days after the attack he slipped while going on lookout and injured his right ankle and upper back (106). The initial diagnosis of post concussion syndrome (124) was carried until early 1971 when it was changed to chronic lumbrosacral strain (106, 107, 110, 112-113, 114-116, 117, 124). Left radiculopathy, rule out herniated lumbar disc (134). Plaintiff's first complaint of low back pain was on November 3, 1970, over a year after the mugging and alleged shipboard accident (118). Plaintiff admitted he got no treatment to his back because he did not complain about his back (75). On December 21, 1973, an exploration of lumbar 4-5 and lumbar 5- sacral 1 vertebraes was performed (141). The nerve root at L4-5 and L5-S1 was explored. It was found that there was no impingement on the nerve roots. There was no evidence of disc protrusion at those levels. No evidence of herniated nucleus pulposus was found. An H bone graft was placed over L4 to S1 and the incision was closed (141-142).

Dr. Irving Balensweig, Defendant's Expert

On October 29, 1970, plaintiff was examined on behalf of owners by Dr. Irving Balensweig (85). The history obtained by the doctor through an interpreter furnished by plaintiff was that plaintiff fell down on a ship and hurt the whole left side of his anatomy to include the head, the arm, the chest, the left lateral back, left lateral abdomen and the entire left leg. The plaintiff gave no history of the mugging. He did not complain of back pain. Examination of the back and tests performed revealed a normal back (A98, A106).

Dr. Irving Mauer, Plaintiff's Expert

Dr. Irving Mauer, plaintiff's orthopedic expert, examined plaintiff on December 21, 1971 and on October 8, 1974, the night before he testified (A74, A78). The examinations were for the purpose of testifying and not for the purpose of treatment (A76).

At the first examination on December 21, 1971, Dr. Mauer took a history with the help of plaintiff's attorney who does not speak Arabic. Dr. Mauer was given no history of the mugging (A77, A82, A85). He was not shown the report of the doctor at Okinawa (A90). He was told that plaintiff fell backward about two years prior to the examination and struck his back and his head. He continued working that day but on the next day he developed pain in his back, radiating down the left leg. He resumed work but after a day or so he couldn't work anymore. He was flown home from Okinawa and was treated by the Public Health Service as an inpatient and outpatient and was adjudged permanently not fit for duty. Upon the history, the examination and findings Dr. Mauer made no diagnosis of plaintiff's condition (A94).

Upon the second examination, Dr. Mauer reviewed the complete Marine Hospital records where he first saw a record of the mugging (A85) and was filled in about it by

plaintiff's attorney without the attorney mentioning plaintiff being hit or falling down (A84), although plaintiff's signed statement shows that he fell to the ground and passed out from the beating (90). Again Dr. Mauer was not shown the report of the doctor at Okinawa which gave no history of a shipboard accident or treatment for the back (A13). Nor was he shown plaintiff's signed statement. However, Dr. Mauer testified that actually the beat up injuries affected the same area he obtained in the history of the fall, the striking the back part of the head and the entire back and low back. The shoreside injuries could have been the injuries described to him by the plaintiff (82). But Dr. Mauer stated that assuming the truth of the statement from the patient that he had no difficulty, that he recovered from the beat-up injuries, assuming that he did that, and went back to full work during the interim period of time, he would have to say it was the shipboard injury (A82-83) which caused plaintiff's injuries.

Dr. Mauer answered in the affirmative the question put by the court: "Your conclusion is based not only on the physical examination but also on the truth of what Mr. Wakim told you" (A83).

At the close of Dr. Mauer's testimony the court suggested that if he wanted to sit and listen at the testimony of Dr. Balensweig he could and that if all the questions are not brought out by the attorneys, he could suggest some questions to plaintiff's attorney to ask Dr. Balensweig (A94). Dr. Mauer sat through Dr. Balensweig's testimony and conferred with plaintiff's attorney.

Dr. Howard Balensweig, Defendant's Expert

Dr. Howard Balensweig reviewed the entire Marine Hospital records and completed the review of the last batch of records the day before he testified (A100-A101). Dr. Balensweig prepared three reports. One was a review of some scattering of the hospital records for 1971 and 1972

(A101). One was examination of plaintiff in May 1974 and review of 1974 record (A101). The third was of examination of plaintiff in October 1974 and incomplete because of the lack of opportunity to review the earlier hospital records and the hospital records for 1973 until the day before he testified (A97, A101).

Dr. Balensweig analyzed the complete hospital records. He testified that the mugging and fall ashore or the alleged fall onboard ship could account for the subjective complaint at the time his father, Dr. Irving Balensweig, saw plaintiff and the time he saw plaintiff (A69, A99). From the beginning and at the time of trial, plaintiff had a psychogenic problem (A99, A110). He complained of numbness of the left arm and left leg (A27). Plaintiff was worked up at the Marine Hospital for possible demialating (phonetic) disease, such as multiple sclerosis. He occasionally complained of pain; but didn't localize it on the lower left arm or left leg (A97). Plaintiff had no complaints of back pain, as revealed by the hospital records, until a year and over one month after his alleged shipboard accident (A97-A98). Plaintiff admitted that he got no treatment for his back because he did not complain about his back (75). Upon the belated complaints, the neurosurgeon, Dr. Holman and Dr. Pirelli (phonetic), Chief of Orthopedics at the hospital, started to work him up thinking that the weakness of his left knee and the diminished nature meant a slipped disc. Plaintiff was extensively worked up. The electro-myelograms in 1971 were negative. Plaintiff subsequently had another in Lebanon, result unknown (A98). On the basis of complaint of back pain progressing, starting the year after the accident and the pain coming down plaintiff's left leg and weakness and numbness, the Marine Hospital doctors finally operated upon him without doing a repeat myelogram (A98). In the opinion of Dr. Balensweig, it was incorrect to perform the operation (A98) on a suspicion that plaintiff had a herniated disc (A97). The doctors fused the spine be-

cause they found nothing wrong (A98). The diagnosis of herniated disc was out (A97). The diagnosis of a slipped disc crept in mistakenly at the end of 1970 and early 1971 (A99). It was on the basis of this diagnosis that plaintiff was carried as permanently not fit for duty and finally operated upon without adequate medical reason (A99). Dr. Balensweig believed that it is entirely medically unreasonable that the back pain resulted from the accident because plaintiff did not complain of pain in the region of the back for a year (A99-A100). There was no cause for back pain discoverable at surgery (A100).

At the close of Dr. Balensweig's testimony, the court granted a five minute recess to give plaintiff's attorney an opportunity to talk to Dr. Mauer to see what ideas Dr. Mauer had of questions he wanted plaintiff's attorney to ask Dr. Balensweig (A101).

On cross-examination Dr. Balensweig repeated that there was not sufficient rationale to perform the surgery. If Dr. Pirella had looked at the records and noticed that plaintiff had no back pain for one year after the alleged accident, Dr. Pirella would not have done the surgery (A109). There were no objective findings to support an operation (A109-A110).

The condition from which plaintiff was suffering before the surgery was functional. After the surgery part of the suffering was functional and part was due to the fact of non-union of the H graft (A110).

Participation of the Court in Questioning the Medical Experts and the Records

The court put questions to Dr. Mauer, during the course of his testimony consisting of 18 pages (A75-94), on 19 occasions (A76, A77, A78, A79, A81, A82, A83, A85, A86). The court also asked Dr. Balensweig questions, during the course of his testimony consisting of 16 pages (A94, A112), on 13 occasions (A96, A97, A99, A100, A108, A110, A112).

Four of the court's questions directed to Dr. Mauer dealt directly with the Marine Hospital records (A76, A79, A85). Five of the questions directed to Dr. Balensweig were in regard to the same records (A97, A100, A104, A108, A110). Thus, the Marine Hospital records were intertwined and interwoven in counsel and the court's questioning of Dr. Mauer and Dr. Balensweig.

The Court's View at the Close of the Case

After the parties rested, the court stated its views with regards to the merits of the case (A112-117).

The court expressed serious doubts whether plaintiff fell on the vessel (A112). There were all kinds of inconsistencies in plaintiff's testimony. The Court was not impressed with Mr. Williams (A115). It did not think plaintiff was badly injured from the mugging (A112, A114). If plaintiff's condition was the result of the shoreside mugging the vessel would not be liable (A114). The court was impressed with Dr. Balensweig's testimony and believed that plaintiff's principal problem was not physical, but psychological in contrast to the diametrically opposite view of Dr. Mauer (A112, A116).

The court believed that even though plaintiff may have not known the English language very well, it believed plaintiff spoke and understood the language better than the interpreter did. If plaintiff really had a backache or a condition, the court believed plaintiff could have communicated his problem to the purser or the mate because the court thought that plaintiff was not that bashful that he would have been unable to get his point across (A115).

The court was aware of Dr. Balensweig's testimony that the spinal operation was unnecessary (A113) and stated that the ship would be liable if there was negligent treatment whether the operation was needed or not (A114).

Briefs

The trial was concluded on October 9, 1974 (A117). The court directed plaintiff's attorney to file his brief in two weeks. An equal period was allowed for defendant to file an answering brief (A116). Plaintiff was also granted one week to reply (A116).

On January 2, 1975, plaintiff's attorney delivered to defendant's attorney plaintiff's post-trial memorandum and medical records (98) and mailed the memorandum to Judge Solomon on January 3, 1975. Plaintiff also furnished to Judge Solomon the transcript of the testimony of Dr. Mauer and Dr. H. Balensweig and the court's views at the close of the trial.

On January 22, 1975, defendant's attorney, who had been on vacation from December 15, 1974 to January 12, 1975 mailed to Judge Solomon defendant's post-trial reply brief with copy to plaintiff's attorney and returned the Marine Hospital records to that attorney (99).

The Events Between the Lower Court's Opinion and the Appeal

On January 24, 1975, Judge Solomon rendered his decision constituting findings of fact and conclusion of law and directed defendant's counsel to prepare an appropriate judgment in accordance with the memorandum opinion (143). The opinion was filed on January 27, 1975 (A2).

On January 30, 1975, the final judgment awarding costs to defendant was filed (A2).

On February 25, 1975, plaintiff filed a notice of appeal (A2).

On April 9, 1975, an amended judgment was filed deleting the award of costs to defendant (A2).

On April 28, 1975, plaintiff filed a notice of appeal from the amended judgment (A2).

On January 28, 1975, plaintiff's attorney mailed to Judge Solomon a reply brief, but did not forward the Marine Hospital records to Judge Solomon (101). The records were not submitted to Judge Solomon. Plaintiff made no motion for a rehearing or to open or vacate the judgment or amended judgment to allow plaintiff to submit the records for consideration by the court, or allow the plaintiff to argue defendant was liable to plaintiff for negligent treatment.

The Lower Court's Decision

The pertinent parts of the lower Court's opinion is as follows:

Plaintiff failed to prove a shipboard injury on Nov. 26, 1969 or at any other time during the voyage.

Any injuries sustained on the voyage resulted from a mugging and robbery ashore in Colon, Panama Canal Zone, on or about Oct. 15, 1969.

Plaintiff admitted the injuries were not serious and did not prevent him from performing all of his duties. Nevertheless, in early Dec. '69 while the vessel was in Okinawa, plaintiff left the vessel to obtain medical treatment.

The condition from which plaintiff now suffers may have resulted from the mugging, but not from a shipboard accident and that all or practically all of his original complaints were functional rather than physical. Although plaintiff has and is exaggerating his injuries, some of these injuries may have been caused by a recent operation which was not completely successful. This operation resulted from misinformation imparted by the plaintiff to the medical and hospital staffs either deliberately or because of plaintiff's functional ailments. Plaintiff understood the English language and could either express himself in English or could convey his meaning to people who only spoke English.

ARGUMENT

The formula in a case of this sort is duty, breach of duty, proximate cause and damage.

Plaintiff presupposes that the defendant breached a duty owed to him. This also presupposes an accident aboard the vessel where the breach of duty occurred. Plaintiff claims there was grease or oil on deck in which he slipped and was caused to fall, so as to give rise to a claim of defendant's negligence and the unseaworthiness of the vessel with resulting physical injuries.

The Lower Court found that plaintiff was mugged ashore with resulting functional injuries.

Nowhere has plaintiff shown that the Lower Court erred in failing to find grease on the deck, a slip and fall in the grease with resulting physical injuries. The Court did not accept plaintiff's testimony that he told the purser and bo'sun that he fell.

Plaintiff's argument is directed to the nature of plaintiff's injuries, physical versus functional, arising from a shipboard accident versus a mugging ashore; the failure of the court to independently examine the hospital records and although not argued, the court, *sua sponte,* should have considered defendant was liable to plaintiff for damages caused by negligent treatment, an unnecessary spinal operation and fusion.

It is difficult to understand plaintiff's arguments absence a showing by plaintiff that the Lower Court erred in finding that defendant was negligent and the vessel was unseaworthy because of the grease on deck; that there was negligent treatment. Nevertheless, defendant shall demonstrate that there is no substance in plaintiff's arguments.

POINT I

The medical testimony sufficiently explained the Marine Hospital records to dispense with the necessity of an independent examination by the District Court.

The medical testimony sufficiently explained the Marine Hospital records, to dispense with the necessity of an independent examination by the District Court.

The medical expert for plaintiff, Dr. Mauer, and the medical expert for defendant, Dr. Howard Balensweig, examined the complete record of plaintiff's treatment at the Staten Island Marine Hospital from Dec. 6, 1969 to Feb. 1974. Dr. Mauer did not examine the medical reports of treatment of plaintiff at Cam Ranh Bay or Okinawa. The doctors were examined and cross examined about their finding and the records. The court participated in the examinations. Dr. Mauer sat by during the direct testimony of Dr. Balensweig at the request of the trial judge to prompt plaintiff's counsel with question to be directed to Dr. Balensweig on cross examination.

The records were voluminous, technical and complicated. The doctors' opinions were diametrically opposed. The doctors were of immense assistance to the trial judge in arriving at and understanding the medical issues, the contents of the records and resolving the question as to which expert was worthy of belief.

The lower court was initially impressed by Dr. Balensweig's opinion that plaintiff's injuries were functional. The medical issues were brief by the parties. The testimony of the experts was transcribed and submitted to the trial judge for his further consideration. The court accepted Dr. Balensweig's opinion.

Plaintiff has not demonstrated how much more knowledge and understanding the trial judge would have gained by independently reviewing the records.

If this had been a jury trial, the records would have been received in evidence, the experts would have explained the records and on the basis of the experts' testimony, the jury would have resolved the medical issues. A busy trial judge is held to no greater standard than a jury in resolving factual issues.

The hospital records contain facts and opinions. They were not arbitrarily disregarded.

> *Cullers* v. *Commissioner of Internal Revenue,* 237 F2d 611, 616 (8 Cir. 1956).

Nor did the court rely upon its unsubstantiated personal beliefs instead of on evidence.

> *Alvery* v. *United States,* 302 F2d 790, 794 (2 Cir. 1962).

It was in the discretion of the trial judge to determine the weight to be given to the expert testimony.

> *Wong Ho* v. *Dulles,* 261 F2d 456, 460 (9 Cir. 1958).

And he was not bound to accept expert testimony in this non-jury trial.

> *Hecht, Levis & Kahn Inc.* v. *New Zealand Ins. Co.,* 121 F2d 442 (2 Cir. 1941).

See also:

> *Nuzzo* v. *Rederei A/S Wallenco Stockholm, Sweden,* 304 F2d 506, 511 (2 Cir. 1962).

Nor was the trial court required to give controlling influence to the testimony of Dr. Mauer or the hospital.

> *Boston Insurance Co.* v. *Read,* 166 F2d 551 (10 Cir. 1948).

The trial court was privileged to rely on the testimony of a single expert, Dr. Balensweig, despite other testimony to the contrary without committing reversible error.

Caddy Imler Creations, Inc. v. *John D. Caddy,* 299 F2d 79, 82 (9 Cir. 1962).

Viewed against the foregoing factual and legal backdrop, plaintiff's asserted error is without merit.

POINT II

The finding that plaintiff's injuries were functional is supported by substantial evidence.

The finding that plaintiff's injuries were functional is supported by substantial evidence. Plaintiff has not shown the finding to be clearly erroneous. Thus plaintiff is bound by the finding.

McAllister v. *United States* (1954), 348 U. S. 19; *Guzman* v. *Pichirilo* (1962), 369 U.S. 698.

POINT III

The lower Court considered and rejected defendant's liability for negligent treatment.

The lower Court considered defendant's liability for negligent treatment at the close of the case (A113-A114) and rejected it in its memorandum opinion (144).

At the close of the case the court mentioned Dr. Balensweig's testimony that the spinal fusion was unnecessary (A113). It also stated the defendant would be liable for the negligence of the hospital (A114), if there were facts supporting negligence.

The trial court made no finding that defendant was guilty of any act or omission with regards to plaintiff's

treatment or a finding of negligence in that respect. The court found that the operation resulted from misinformation imparted by the plaintiff to the medical and hospital staff either deliberately or because of plaintiff's functional complaints. The Court further found that plaintiff understood the English language and could convey his meaning to people who only spoke English. Thus the Court put the blame on plaintiff (144).

In the circumstances it is fair to state that the Court did consider plaintiff's assertion of defendant's liability for negligent treatment and rejected it.

In any event plaintiff did not submit a reply brief formally raising the point or move the Court to modify its decision or vacate its judgment.

Plaintiff should not now be allowed to raise his contention on this appeal.

CONCLUSION

The judgment below should be affirmed in all respects.

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Due and timely service of Two copies
of the within Brief is hereby
admitted this 10th day of December 1975

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